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Hunts Point Multi-Service Center and District Council 1707, AFSCME, AFL-CIO. Case 2-CA-39806

December 28, 2010

DECISION AND ORDER

BY MEMBERS BECKER, PEARCE, AND HAYES

The Acting General Counsel seeks a default judgment in this case on the ground that Hunts Point Multi-Service Center (the Respondent) failed to file an answer to the complaint. Upon a charge filed by District Council 1707, AFSCME, AFL-CIO (the Union) on March 29, 2010¹ the Acting General Counsel issued a complaint on July 29 against the Respondent, alleging that it violated Section 8(a)(5) and (1) of the National Labor Relations Act by failing to execute the collective-bargaining agreement (the agreement) reached with the Union.

By letter dated August 24, the General Counsel notified the Respondent that it had not filed an answer to the complaint by the August 12 deadline. The General Counsel further advised the Respondent that, unless it filed an answer by September 7, the General Counsel would take appropriate action, including filing a Motion for Summary Judgment.

On September 7 and 8, the Respondent, by its executive director, Manuel Rosa, sent letters to the Region explaining the reasons for its delay in executing the agreement and requesting an extension of time to enable the parties to reach a resolution. On September 9, the Region granted the Respondent an extension until September 16 to answer the complaint. Despite this extension, the Respondent failed to file an answer.

On September 27, the Acting General Counsel filed a Motion for Default Judgment with the Board. Thereafter, on September 28, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is

shown. In addition, the complaint affirmatively states that unless an answer is received by the Regional Office on or before August 12, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Further, the undisputed allegations in the Acting General Counsel's motion disclose that the General Counsel, by letter dated August 24, notified the Respondent that it had not filed an answer to the complaint and provided the Respondent an additional opportunity to file an answer by September 7. The Respondent was further advised that if it failed to file an answer by that date, a Motion for Summary Judgment would be filed.

As described above, the Respondent sent letters to the Region on September 7 and 8, explaining the reasons for its failure to execute the agreement and requesting an extension of time to enable the parties to reach a resolution. The September 7 letter stated, in relevant part, that "[The Respondent's] fiscal position and the changes in its program operation will necessitate that we re-open the economic portion of the negotiations." The September 8 letter states that "[the Respondent] is suffering through a severe financial crisis . . . , [and] by meeting with [the Union] there will be a better understanding of the current circumstances and [the Respondent] will work with the union to ensure that the spirit and intent of our recognition of [the Union] as the bargaining agent for covered employees is fully met."

The undisputed allegations in the motion for default judgment show that, on September 9, the Region issued an order extending time to file answer to September 16. The Region received no further response from the Respondent. Similarly, the Respondent did not respond to the Board's Notice to Show Cause why default judgment should not be granted.

At the outset, we recognize that the Respondent does not have legal representation in this proceeding. In determining whether to grant a motion for default judgment on the basis of a respondent's failure to file a sufficient or timely answer, the Board has, as a general matter, shown some leniency to respondents who proceed without benefit of counsel. See, e.g., *Clearwater Sprinkler System*, 340 NLRB 435 (2003). Thus, the Board generally will not preclude determination on the merits of a complaint if it finds that a pro se respondent has filed a timely answer that can reasonably be construed as denying the substance of the complaint. *Id.* at 435.

Under Section 102.20 of the Board's Rules, the Respondent's letters, described above, do not constitute a proper answer to the complaint, even considering the leniency afforded to pro se respondents, because they completely fail to address any of the factual or legal alle-

¹ All dates refer to 2010 unless otherwise indicated.

gations of the complaint. While the letters do state that the Respondent hopes further negotiations with the Union will “ensure that the spirit and intent of our recognition of [the Union] as the bargaining agent for covered employees is fully met,” this assertion does not address the alleged failure and refusal to execute the agreement with the requisite specificity mandated by Section 102.20. See *Pearle Express*, 342 NLRB 669 (2004) (finding that letter that did not specifically deny allegations in complaint did not constitute answer).

Further, even if the Respondent’s letters could be construed as a sufficient answer under our Rules, they fail to raise a legally sufficient defense to default judgment. To the extent that the Respondent’s statements about its fiscal position can be construed as an explanation for its failure to execute the collective-bargaining agreement, it is well established that inability to pay is not a defense to a charge that an employer has violated Section 8(a)(5) of the Act. See *Pantry Restaurant*, 341 NLRB 243, 244 (2004); *Convergence Communications, Inc.*, 339 NLRB 408, 412 (2003); accord: *Steiner Trucraft*, 237 NLRB 1079, 1081 (1978) (employer violated Sec. 8(a)(5) when it refused to execute an agreed-upon contract after it closed a plant for economic reasons).

In sum, the Respondent failed to file a proper answer to the complaint and failed to respond to the Notice to Show Cause why default judgment should not be granted. Accordingly, we grant the Acting General Counsel’s Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a New York corporation, with its principal place of business located at 754 East 151st Street, Bronx, New York, has been engaged in community-based health care and health-related services, as well as other social services. During the year preceding issuance of the complaint, a representative period, the Respondent, in conducting the business described above, derived gross revenues in excess of \$250,000, and purchased and received at its place of business goods and materials valued in excess of \$5,000 from outside the State of New York.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, Manuel A. Rosa has held the position of executive director and is a supervisor within the meaning of Section 2(11) of the Act and an agent of the

Respondent within the meaning of Section 2(13) of the Act.

The following employees of the Respondent (the professional unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time social workers and phlebotomists employed by Respondent, excluding all non-professional employees included in a separate unit, and all other employees, including confidential employees, and guards and supervisors as defined in the Act.

The following employees of the Respondent (the non-professional unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees, including receptionists, record room clerks, record keepers, tech support, billing clerks, and bookkeepers, and excluding all professional employees and all other employees, including confidential employees, and guards and supervisors as defined in the Act.

At all material times, pursuant to a petition filed by the Union in Case 2–RC–23143, the Union has been certified by the Board, which conducted secret-ballot elections in each of the units described above, as the exclusive representative of the employees in the units for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

At all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the employees in each of the units.

On or about December 16, 2009, the Union and the Respondent reached an agreement on all the terms for an initial collective-bargaining agreement covering the terms and conditions of employment of the employees in both units described above, and the Respondent agreed to execute this agreement on or before January 8.

On January 11, the Union, by its attorney, by email, requested that the Respondent, acting by Rosa, execute the agreement. At all times since January 11, the Respondent has failed and refused, and is failing and refusing, to execute the collective-bargaining agreement.

CONCLUSION OF LAW

By failing and refusing to execute the agreement, the Respondent has failed and refused, and is failing and refusing, to execute the collective-bargaining agreement negotiated by the parties, and the Respondent thereby has

been engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act. The unfair labor practices of the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) of the Act by failing and refusing, since about January 11, to execute the collective-bargaining agreement agreed to by the Respondent and the Union on December 16, 2009, we shall order the Respondent to execute and implement the collective-bargaining agreement and give retroactive effect to its terms. We shall also order the Respondent to make whole the unit employees for any losses attributable to its failure to execute the 2009 agreement, as set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), and *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

ORDER

The National Labor Relations Board orders that the Respondent, Hunts Point Multi-Service Center, Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to execute the collective-bargaining agreement with District Council 1707, AFSCME, AFL-CIO, agreed to by the Respondent and the Union on December 16, 2009, and which the Union requested that the Respondent execute on January 11, 2010.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Execute the collective-bargaining agreement reached by the Respondent and the Union on December 16, 2009, and give it retroactive effect to January 11, 2010.

(b) Make unit employees whole for any loss of earnings and other benefits they have suffered as a result of the Respondent's failure to execute the agreement, plus

daily compound interest, as set forth in the remedy section of this Decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay, if any, due under the terms of this Order.

(d) Within 14 days after service by the Region, post at all its Bronx, New York facilities, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.² In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 11, 2010.

Dated, Washington, D.C. December 28, 2010

Craig Becker, Member

Mark Gaston Pearce, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

² We shall provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

An Agency of the United States Government
The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to execute the written collective-bargaining agreement with District Council 1707, AFSCME, AFL-CIO, agreed to by the Union and us on

December 16, 2009 and that the Union requested we execute on January 11, 2010.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL execute and implement the collective-bargaining agreement reached by the Union and us on December 16, 2009.

WE WILL give the agreement retroactive effect to January 11, 2010.

WE WILL make unit employees whole for any loss of earnings and other benefits they have suffered as a result of our failure to execute the agreement, with daily compounded interest.

HUNTS POINT MULTI-SERVICE CENTER